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IN THE UTAH SUPREME COURT

UTAH CHAPTER OF THE SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, SOUTHERN UTAH WILDERNESS ALLIANCE, AND THE NATIONAL PARKS CONSERVATION ASSOCIATION Petitioners, v. DIVISION OF OIL, GAS, & MINING DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH Respondent,	**AMENDED RULE 19 PETITION FOR WRIT OF EXTRAORDINARY RELIEF** Case No. 20140921-SC Board of Oil, Gas and Mining Cause No. C/025/005

Pursuant to Rule 65B of the Utah Rules of Civil Procedure, and in accordance with Rule 19 of the Utah Rules of Appellate Procedure, Petitioners (the Utah Chapter of the Sierra Club, the Natural Resources Defense Council, the Southern Utah Wilderness Alliance and the National Parks Conservation Association) hereby submit this Amended Petition for Writ of Extraordinary Relief to this Court. The basis for submitting an amended petition is an intervening Order issued by the Board of Oil, Gas and Mining on November 3, 2014, that represents a significant turn of events in favor of Petitioners on

one of the major issues at stake in the matter, yet still leaves the Petitioners in jeopardy of improper and wholly unnecessary constitutional and other substantive burdens. In conformity with the November 3 Order, the petition requests as follows.

I. PERSONS OR ASSOCIATIONS WHOSE INTEREST MAY BE AFFECTED

1. Petitioners are nonprofit entities with an interest in ensuring compliance with state and federal laws and regulations governing coal mining.

2. Respondent Board of Oil, Mining and Gas ("the Board") is an administrative agency. Relief is sought from the Board's Order Concerning Renewed Motion for Leave to Conduct Discovery – Award of Fees and Cost, issued September 25, 2014, and from the Supplemental Order Concerning Renewed Motion For Leave To Conduct Discovery - Award Of Fees And Costs, issued November 3, 2014. Copies of the Orders accompany this Petition.

3. Alton Coal Development ("Alton") applied for Board approval to conduct coal mining operations in the State of Utah. Petitioners brought a Request for Agency Action with the Board to either modify or halt Alton's requested permit. Petitioners' challenge was ultimately rejected by the Board and this Court, and Alton subsequently sought attorney fees against Petitioners.

II. ISSUES PRESENTED AND RELIEF SOUGHT

To seek an award of attorney fees against Petitioners, Alton has to show that Petitioners acted "in bad faith for the purpose of harassing or embarrassing the permittee [Alton]." Board Rule B-15. Alton proposed intrusive discovery into Petitioners' donors,

advocacy, and litigation strategies, hoping to find what Alton admitted it did not then have, *i.e.*, evidence of an improper motive. Both Petitioners and the Utah Division of Oil, Gas and Mining pointed out to the Board that, under Rule B-15, subjective intent is immaterial unless objective bad faith (frivolousness) is first shown. Petitioners also noted that allowing such discovery into advocacy groups' strategies, funding, etc., without that threshold showing poses significant federal and state constitutional concerns. Petitioners filed a motion to dismiss the attorney fee petition, arguing that, as a matter of law, Alton could not show that Petitioners' challenge to the permit was frivolous.

Under Rule B-15, the Board had a duty to correctly apply the law, *i.e.*, to first decide the dispositive legal issue presented in the motion to dismiss. Only if it found objective frivolousness (and therefore denied the motion to dismiss) should the Board have addressed Alton's request for discovery. In its Order of September 25, 2014, the Board refused to rule on the motion to dismiss, however, and instead ruled (over a dissent) that Alton could conduct discovery into Petitioners' motives, communications, etc., regardless of whether Petitioners' underlying challenge was objectively colorable.

Petitioners filed their original Rule 19 Petition with this Court on October 15, 2014. In direct and express response to that Petition, the Board *sua sponte* issued a Supplemental Order on November 3, 2014. That Order disposed of a crucial issue in the case: the Board acknowledged that the standard governing the award of attorney fees contains an objective component of frivolousness on the merits. However, the Board refused to concede that such objective frivolousness is determined solely by the record of the proceedings on the merits. Instead, the Board left ajar the door to discovery, pointing

to 17 issues on the merits that might now be amenable to discovery upon a showing (entirely undefined by the Board), through briefing, that discovery is warranted. In doing so the Board has gone even further than requested by Alton.

Thus, as amended, the single primary issue in this matter, discussed further in the accompanying Memorandum of Points and Authorities, is no longer whether Board of Oil, Gas & Mining Rule B-15 permits an award of attorney fees only when a petitioner makes a showing of both objective and subjective bad faith. Per the Board, it clearly does.

Rather, the primary issue is now whether Alton made the required showing of objective frivolousness on the record. If not, the Board's continuing willingness to allow Alton to conduct unnecessary invasive, expensive, and constitutionally troublesome discovery is patently wrong and requires immediate correction.

Because the absence of frivolousness is apparent from the record and can be determined by the Court on the briefing, the relief sought by Petitioners is an order directing the Board to dismiss the Petition for Attorney Fees. Once the petition is dismissed, the Board's ruling on discovery will be moot. Alternatively, the Court should direct the Board to make its determination whether there was objective bad faith based on the extensive record from the merits-phase proceedings, and without discovery.

III. FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES PRESENTED BY THE PETITION

The foregoing section provides a general summary of the circumstances necessary to understand the narrow legal issues presented. The procedural background underlying

the Petition is set forth in greater detail in the accompanying Memorandum of Points and Authorities.

IV. REASONS WHY NO OTHER PLAIN, SPEEDY OR ADEQUATE REMEDY EXISTS AND WHY THE WRIT SHOULD ISSUE

Petitioners have no plain, speedy, and adequate remedy in the ordinary course of the law other than the issuance by this Court of an extraordinary writ. An appeal as of right is not available because the order authorizing discovery is not a final agency action under Utah Code §§ 78A-3-102(3)(e)(i) and 63G-4-401(1) and 3(a).[1] This Court has authority to oversee the acts of officials, courts and agencies under Rule 19, through an extraordinary writ, to ensure that they discharge their duties in a legal manner.

Both Orders authorizing discovery raise a narrow but significant legal issue of first impression that is properly reviewable by this Court. The standards governing whether fees should be awarded are tailored so as to avoid undue burden and intrusion on substantive rights of citizen participation and advocacy protected by the Utah Constitution and the United States Constitution. Imposition of these burdens and violations of these rights, cannot be undone.

Judicial and administrative economy would also be served in this case by resolving the dispositive legal issue now, before unnecessary proceedings and discovery are undertaken. The challenged orders, by their very nature and wording, invite continuing disputes over discovery scope, and likely further requests for review by this

[1] The District Court lacks jurisdiction to review actions of certain specified agencies, one of which is the Board of Oil, Gas and Mining. *See* 78A-3-102 (Supreme Court "has appellate jurisdiction, including jurisdiction of interlocutory appeals," over final Board actions).

Court. If, as Petitioners contend, the orders are predicated on a plainly incorrect reading of the law, these disputes can be avoided in their entirety.

Petitioners specifically seek from this Court a determination that Rule B-15's threshold standard of objective frivolousness is derived exclusively from the record of the merits proceedings, and that no further development of the record is required to make that determination. This Court is positioned to make a determination now that the Petitioners' Request for Agency Action was not frivolous based, among other things, on its previous review of the merits appeal. This will conclusively resolve all remaining issues related to this litigation.

V. REASON WHY IT IS IMPRACTICAL TO FILE THE PETITION WITH THE DISTRICT COURT

As noted above, this Court has exclusive appellate jurisdiction over decisions of the Board. U.C.A. 78A-3-102(3)(iv). Thus, the district court lacks any jurisdiction to consider this matter, either as a matter of final or nonfinal appellate review. Additionally, because Alton has alleged that this Court (implicitly) found Petitioners' challenge to be frivolous, the Court's own prior ruling in this case must be interpreted and, if necessary, clarified. Only the Court has the latter authority.

VI. REASON WHY IT IS IMPRACTICAL TO FILE FOR INTERLOCUTORY REVIEW UNDER UTAH RULE OF APPELLATE PROCEDURE 5

Interlocutory review under Utah Rule of Appellate Procedure 5 is not applicable to nonfinal administrative decisions.

DATED this 20th day of November, 2014.

CHRISTENSEN & JENSEN, P.C.

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Attorneys for Petitioners Utah Chapter of the Sierra Club et al.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2014, a true and correct copy of the foregoing **AMENDED RULE 19 PETITION FOR WRIT OF EXTRAORDINARY RELIEF** was delivered via email to the following:

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Judy Garrett, Secretary

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, DIVISION OF OIL, GAS AND MINING, Respondent, ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH Intervenors.	ORDER CONCERNING RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY - AWARD OF FEES AND COSTS Docket No. 2009-019 Cause No. C/025/0005

Pursuant to the Board's February 20, 2014 Interim Order Concerning Motion for Discovery, Alton Coal Development ("ACD") on March 5, 2014 filed a Petition for Award of Costs and Expenses (the "Petition"). In conjunction with the Petition, ACD filed a Renewed Motion for Leave to Conduct Discovery – Award of Fees and Costs (the "Discovery Motion"). Petitioners on April 4, 2014 filed a Motion to Dismiss Alton Coal Development's Petition for Award of Costs and Expenses ("Motion to Dismiss") as well as a Motion to Stay Discovery pending a decision on the Motion to Dismiss (the "Stay Motion"). The parties to date have filed various memoranda in connection with the Petition, Discovery Motion, Motion to Dismiss and Stay Motion. The Board, having read the above-referenced filings, hereby enters the following order concerning discovery. The ruling announced below was approved by a vote of six of seven

Board members. Board member Kelly L. Payne participated in all of the Board's deliberation sessions except one but has reviewed all pleadings and participated in the vote. Board member Payne did not support this ruling and has set forth a brief dissenting opinion below.

The parties disagree about whether an objective bad faith element is part of the controlling bad faith test applicable to the Petition. *See* Petitioners' Memorandum in Support of Motion to Dismiss ACD's Petition for Award of Costs and Expenses ("Petitioners' Brief") at 3-20 (arguing for inclusion of objective bad faith element); ACD's Memorandum in Opposition to Motion to Dismiss at 7-8 (arguing that controlling test includes only subjective bad faith element); Division's Memorandum in Response to Petitioners' Motion to Dismiss ("Division's Brief") at 2-5 (arguing that controlling test requires a showing of objective as well as subjective bad faith). All parties agree, however, that a subjective bad faith element forms a part of that test. *See* Petitioners' Brief at 3-9, 21-24; ACD's Supplemental Memorandum in Support of its Renewed Motion for Leave to Conduct Discovery at 3-4; Division's Brief at 2-3, 11.

While Petitioner argues that discovery is not necessary with respect to, and would not inform, any part of the bad faith test, *see generally* Petitioners' Opposition to ACD's Renewed Motion for Leave to Conduct Discovery, the Board agrees with ACD and the Division that discovery would inform, and will be necessary to analyze, the subjective bad faith element. *See* ACD's Supplemental Memorandum in Support of its Renewed Motion for Leave to Conduct Discovery at 3-4 (requesting leave to conduct discovery regarding subjective bad faith); Division's Memorandum in Response to ACD's Renewed Motion for Leave to Conduct Discovery at 2-4 (arguing that discovery is appropriate with respect to subjective bad faith element). For this reason, the Board finds that good cause exists to permit discovery.

Given that good cause exists for discovery related to the subjective bad faith element that

all parties concede is part of the controlling test, the Board authorizes ACD to conduct discovery in accordance with the Utah Rules of Civil Procedure. Following discovery, the Board will decide all issues addressed in the above-referenced briefs concerning elements of the bad faith test beyond the subjective bad faith component, as well as application of that test to the facts of this case in light of any information gained through discovery. The Board will defer any ruling on arguments made in the Motion to Dismiss[1] until after discovery is complete and the Board can undertake a consideration of all disputed issues.[2]

Although the prior filings (including ACD's proposed discovery requests and Petitioners' briefs concerning issues of privilege, proportionality, and other matters) lay out the parties' primary disagreements about the appropriate scope of discovery, the Board will rule upon discovery disputes on an ongoing basis as discovery is conducted. Once discovery requests have been generated, Petitioners may renew the arguments made in prior briefing in connection with any objections it has to the discovery requests.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Dissenting Opinion of Board Member Payne – This Board member does not join the majority in approving discovery at this time. I would prefer the Board first resolve the issues raised in the Petitioners' pending Motion to Dismiss. Those issues include whether the "bad faith" test governing a permittee's petition for attorney's fees includes elements of both objective

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[1] The Board agrees with ACD that the Motion to Dismiss implicates matters beyond the sufficiency of the allegations of the fee petition, and raises questions of sufficiency of proof. *See* ACD's Memorandum in Opposition to Motion to Dismiss at 3-5. The Board will address the issues raised in the Motion to Dismiss after discovery is complete.

[2] As ACD argued, discovery may inform the objective bad faith analysis if such an analysis forms part of the test. *See* ACD's Reply Memorandum in Support of Renewed Motion for Discovery at 7-8. The Board will consider any evidence gathered through discovery bearing on objective bad faith when the Board considers all disputed issues following the discovery phase.

and subjective bad faith, whether any objective bad faith inquiry can be decided on the basis of the existing record, and if so, whether objective bad faith can be shown in connection with any of the subject claims. Depending upon the Board's resolution of these questions, discovery into subjective bad faith may not be necessary. This Board member believes that answering those questions now, rather than deferring them for later decision after discovery is complete, is the most logical and economical way to proceed. I would therefore not authorize discovery at this time.

Issued this 25th day of September, 2014.

UTAH BOARD OF OIL, GAS & MINING

Ruland J Gill, Jr., Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **ORDER CONCERNING RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY - AWARD OF FEES AND COSTS** for Docket No. 2009-019, Cause No. C/025/0005 to be mailed via E-mail, or First Class Mail, with postage prepaid, this 26th day of September, 2014, to the following:

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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, DIVISION OF OIL, GAS AND MINING, Respondent, ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH Intervenors.	SUPPLEMENTAL ORDER CONCERNING RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY - AWARD OF FEES AND COSTS Docket No. 2009-019 Cause No. C/025/0005

On September 25, 2014, the Board issued an Order Concerning Renewed Motion for Leave to Conduct Discovery – Award of Fees and Costs (the "Order"). The Order noted that all parties agree that "subjective bad faith" forms a part of the test governing the petition of Alton Coal Development, LLC ("ACD") for an award of attorneys' fees. Order at 2. The Order noted disagreement among the parties regarding whether "objective bad faith" also formed a part of that test, and whether objective bad faith can be shown in this case. *Id.* The Order authorized the commencement of discovery into subjective bad faith and declared the Board's intention to issue a ruling on all disputed issues after the completion of discovery. *Id.* at 2-3. Although it could have been clearer in this regard, the Order did not indicate the Board was suspending its internal deliberations regarding questions of objective bad faith in the interim period. In fact, the

Board continued to analyze those questions even as it ordered the commencement of discovery. As discussed more fully below, the Board, as part of these ongoing deliberations, has concluded that both objective and subjective bad faith are necessary elements of the controlling test.

On October 15, 2014, the Utah Chapter of the Sierra Club et al. ("Sierra Club") filed a Rule 19 Petition for Writ of Extraordinary Relief ("Rule 19 Petition") with the Utah Supreme Court, challenging portions of the Order. In light of the filing of the Rule 19 Petition, after further deliberation, and in the interest of more fully explaining both where the Board presently stands in its ongoing analysis of objective bad faith as well as its case management intentions moving forward, the Board issues this supplemental order.

I.

ACD Must Show Both Objective and Subjective Bad Faith to Recover Attorneys' Fees.

The Rule B-15 standard requires ACD to show that Sierra Club's claims were brought "in bad faith for the purpose of harassing or embarrassing" ACD. As noted in the Order, the parties disagree about whether this standard includes an "objective bad faith" element. *See* Order at 2.

The lack of case law construing the meaning of this provision makes this question difficult to resolve. It is a matter of first impression. Based on the authorities that have been brought to the Board's attention, however, the Board is of the opinion that the Rule B-15 standard includes both an objective as well as subjective element.

Although the language of Rule B-15 goes out of its way to include a subjective element with its "for the purpose of harassing or embarrassing" language, it also includes a separate, general reference to "bad faith." As has been noted by the Division and Sierra Club, if the Rule B-15 standard required only a subjective showing that Sierra Club acted "for the purpose of

harassing or embarrassing," it would render the separate, preceding reference to "bad faith" superfluous.

The one case cited by the parties that has analyzed the SMCRA standard upon which Rule B-15 is based looked at both objective and subjective elements in analyzing bad faith. *See Lucchino v. Pennsylvania*, 744 A.2d 352, 353-55 (Pa. Commw. Ct. 2000), *aff'd on other grounds*, 809 A.2d 264, 266, 269 (Pa. 2002) (upholding the lower court's decision even though the lower court did not need to apply the more-demanding SMCRA standards).

Rule B-15 itself announced that it adopted the federal rules' provisions for payment of attorneys' fees. The federal rule on attorneys' fees (like Rule B-15 in subsections (c) and (d)) has two subsections with almost identical language. *Compare* 43 C.F.R. § 4.1294(c) (2013) ("bad faith and for the purpose of harassing or embarrassing"), *with id.* § 4.1294(d) ("bad faith for the purpose of harassing or embarrassing"). Although there is an "and" in one subsection and not in the other, the Office of Surface Mining considers them to be the same standard. Petitions for Award of Costs and Expenses 50 Fed. Reg. 47,222, 47,223 (Nov. 15, 1985) (equating subsections (c) and (d)); Special Rules Applicable to Surface Coal Mining Hearings and Appeals, 43 Fed. Reg. 34,376, 34,385-86 (Aug. 3, 1978) (same). The federal agencies have therefore treated this provision as involving a two-part inquiry. Although the federal interpretation is not controlling with respect to the Utah coal program, the Board finds it persuasive in the present context.

In other areas of the law in which there is no provision expressly providing for an objective element, or for a two-part test, courts have nevertheless recognized that objective bad faith is a required element. *See, e.g., Sterling Energy, LTD v. Friendly Nat'l Bank*, 744 F.2d

1433, 1435-36 (10th Cir. 1984) (applying a two-part test with respect to the federal courts' inherent power to award fees based on a showing of bad faith); *see also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 414 n.1, 421 (1978) (holding that a Civil Rights Title VII provision granting a court the authority to award attorney fees "in its discretion" still requires "a finding that the plaintiff's action was frivolous, unreasonable, or without foundation"). When interpreting attorney-fees provisions under environmental statutes, such as the Endangered Species Act and Clean Water Act, federal courts have adopted the *Christiansburg* standard that requires defendants to prove an objective element. *Saint John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1063 (9th Cir. 2009) (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air,* 478 U.S. 546 (1986); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095-96 (9th Cir.1999)). ACD was unable to cite to any source of law where a bad-faith test for attorneys' fees did not include some kind of an objective component.

For the above reasons, and for reasons discussed in the Division's and Sierra Club's briefs directed to this issue, the Board will apply Rule B-15 as a two-part test requiring a permittee seeking fees to demonstrate both an objective and subjective element.

II.

The Board Is Presently Analyzing Whether Objective Bad Faith Can Be Shown with Respect to Any of the Seventeen Claims Tried in the Merits Phase of this Case. Unlike the initial legal question of whether the controlling standard involves a two-part objective-and-subjective test, the assessment of the seventeen separate claims for objective bad faith will be more time-consuming for the Board. This is true for a few reasons. First, five of the present seven sitting Board members were not involved in the merits phase of this matter, and

consequently, must review a voluminous record in order to make this assessment. Second, the Board is comprised of volunteer members with full-time jobs, and meets as a Board only one day per month. Most of the available time on any given monthly hearing date is consumed with other docketed items, leaving little time for ongoing deliberations in this matter. These factors are part of the reason the Board desired to get discovery underway as the Board performs the time-consuming analysis of the seventeen claims for objective bad faith. The Board would then have the benefit of using any applicable evidence gathered through discovery to make a final determination and issue a decision on all disputed issues. The Board's analysis of the seventeen claims for objective bad faith is ongoing.

Once its deliberations are complete, the Board will announce if it has been able to reach a conclusion on whether the existing record supports a determination that any of the seventeen claims were brought in objective bad faith, and whether it believes any discovery would be proper and aid in that determination.[1]

To aid the Board in its objective bad faith analysis, the Board would like the parties to brief an issue that has received little direct attention. Specifically, if the Board finds that some, but not all, of the seventeen claims were brought in objective bad faith, can ACD recover the

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[1] Although the Board views discovery as primarily directed to the subjective bad faith issues, as discussed in footnote 2 of the Order, the results of discovery have the potential to inform the objective bad faith analysis as well. Sierra Club challenges this idea, citing a number of cases in which courts resolved the objective bad faith analysis solely on the basis of the existing record. Memorandum of Points and Authorities in Support of Petition for Writ of Extraordinary Relief at 2. Although these cases demonstrate that courts frequently can decide the issue on the existing record, they do not hold that a court must decide the issue on the existing record, or that the results of discovery cannot inform the objective bad faith analysis. The Board might conclude as a result of its deliberations that it can decide the objective bad faith question on the existing record without the need for discovery on that issue.

attorneys' fees attributable to that subset of claims if the Board finds that those claims were brought in subjective bad faith? Or would the fact that some claims did not involve objective bad faith mean that the inquiry would end, and the entire action would be deemed not to have been brought in bad faith? Unless the parties can stipulate to some alternative briefing schedule, the Board would like ACD to file a brief addressing this question fourteen days from the date of this order, and for Sierra Club and the Division to file responsive briefs seven days after ACD's brief has been filed.

III.

The Board Will Limit the Scope of Further Discovery Activity While It Conducts Its Objective Bad Faith Analysis. ACD has filed proposed sets of discovery in connection with prior briefing, and Sierra Club has offered argument against allowing the proposed requests. The Board in its Order did not authorize, or deem served, ACD's proposed discovery requests, but instead instructed ACD to generate discovery requests anew. The Board did this in part to allow ACD, in light of the arguments made by Sierra Club, to have another opportunity to decide which requests it intended to make. The Board, at the present juncture, still directs ACD to generate its discovery requests, for Sierra Club to make its objections, and for the parties, after making reasonable efforts to resolve any disputes without Board assistance, to then file any motions with respect to disputed discovery issues they feel is warranted. In this way, the Board, as it conducts its deliberations concerning objective bad faith, can also analyze the disputed discovery issues. After discovery requests, objections, and motions are made, the Board may stay further discovery activity while it analyzes both the objective bad faith questions as well as any discovery disputes.

Concurring Vote of Board Member Payne – This Board member concurs in the action taken in this Supplemental Order but, consistent with my opinion in the initial Order, I would stay even the initial discovery steps outlined above until we have concluded our objective bad faith analysis.

Dissenting Vote of Chairman Gill – I respectfully dissent from my other board member's ruling regarding the fee standard involving the two-part test.

From what I know today, Rule B-15 should be read to include only a "subjective" test. The plain language of the rule says that bad faith can be found if the intent of the Sierra Club is to harass or embarrass. Really, nothing more needs to be added or inferred.

To conclude that Rule B-15 needs an objective test requires a preliminary determination that within the four corners of the Rule there is an ambiguity and therefore the Board needs to look outside of the Rule to common law – weak as it may be. I don't think the ambiguity exists.

Most importantly, I believe this Utah mining matter dealing with legal fee reimbursements is a case of first impression. As such, this board should allow discovery and use the information gained to determine how Rule B-15 is to be applied in this case. Allowing appropriate discovery to go forward would allow the Board to make the most informed decision possible. For example, ACD should be allowed to examine if Sierra Club's motive is to fish for legal fees as part of a motive to harass and embarrass.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Issued this 3rd day of November, 2014.

UTAH BOARD OF OIL, GAS & MINING

Ruland J Gill, Jr., Chairman

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Order to be mailed by first class mail, postage prepaid, this 3rd day of November, 2014 to:

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